Supreme Court, U.S.
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No. 97-_____

IN THE
SUPREME COURT OF THE
UNITED STATES
October Term, 1997

Alexander Paul and Darlington County, of whom Alexander Paul is
Petitioner,

v.

C.R. Cribb and Vacie S. Cribb,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTION PRESENTED FOR REVIEW

Is a party denied constitutional due process when a court enters an order based upon an agreement announced by attorneys in open court, when the court refuses to allow the party to speak and the party obviously disagrees with the settlement announced by his attorney?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Alexander Paul, Respondents C.R. Cribb and Vacie S. Cribb, together with Darlington County (South Carolina), a co-defendant of Petitioner in the trial court.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Alexander Paul, respectfully prays that this Court issue a *Writ of Certiorari* to review the May 14, 1996 judgment and opinion of the South Carolina Court of Appeals, the June 21, 1996 denial of his Petition for Rehearing, and the November 8, 1996 denial of his Writ of Certiorari by the South Carolina Supreme Court.

OPINIONS BELOW

The Order of the South Carolina Supreme Court dated November 8, 1996 denying Petitioner's Petition for Writ of Certiorari to the South Carolina Court of Appeals is not reported and is reprinted in Appendix A hereto at App. 1, *infra.*

The South Carolina Court of Appeals' denial of Petitioner's Petition for Rehearing dated June 21, 1996 is not reported and is reprinted in Appendix B hereto at App. 3, *infra.*

The Opinion and Judgment of the South Carolina Court of Appeals dated May 14, 1996 affirming the trial court's Order is not reported and is reprinted in Appendix C hereto at App. 4, *infra.*

The Order of the trial court in the South Carolina Court of Common Pleas for the Fourth Judicial Circuit, The Honorable James E. Lockemy presiding, of October 18, 1994 was not reported, and is reprinted in Appendix D hereto at App. 6, *infra.*

STATEMENT OF JURISDICTION

Petitioner seeks review from the Opinion of the South Carolina Court of Appeals of May 14, 1996. Petitioner's

subsequent Petition for Rehearing was denied on June 21, 1996. The Supreme Court of South Carolina denied Petitioner's Petition for Writ of Certiorari on November 8, 1996. The Supreme Court has jurisdiction to review cases in the South Carolina Supreme Court by *Writ of Certiorari* by virtue of 28 U.S.C. § 2104.

CONSTITUTIONAL AMENDMENTS INVOLVED

Petitioner seeks a Writ of Certiorari based upon his due process rights under the 5th and 14th Amendments of the United States Constitution.

STATEMENT OF THE CASE

Petitioner Alexander Paul ("Paul") is a farmer whose farm is located in the County of Darlington, South Carolina. This case involves a dirt road that runs through Paul's farm. Respondents C.R. Cribb and Vacie S. Cribb (the "Cribbs") live along the dirt road and brought this action against Paul and against Darlington County to obtain County maintenance of the road. An earlier order of the trial court had found that the road was a county road (by implied dedication), and ordered the County to lay out the road based upon an eighteen

to twenty-two foot width. That earlier order is not in controversy.

After a continuing dispute between the Cribbs and Paul, the lower court conducted a hearing to determine where the road was to be located, and whether the County could take an additional six feet in width so as to maintain the road as a "two plow" road, with a three foot shoulder on each side.

During the hearing, Paul's attorney (identified as Ms. Holloway in the transcript) took virtually no part. Rather than issuing an order, the court held a private conference, with the attorneys only following which the attorneys announced that they had entered into an agreement. The agreement was read into the record. Paul immediately asked the court to be permitted to speak, evidently to object to the purported agreement which had been announced by his attorney. The court refused to hear Paul's objections:

Mr. Paul: Let me say one thing, judge.

The Court: I'm not sure I want to let you say one thing.

Mr. Paul: This is a case that would make the founding forefathers of this Country's bones, dried bones,

get up and tremble in their graves.

The Court: Yes, sir. I pledge allegiance to the flag. Okay. Everybody, that's enough. Thank you very much. This case is over.

Paul appealed, *pro se*, asserting, among other things, that his property was being taken unconstitutionally. The Court of Appeals affirmed, based upon Paul's failure to raise the constitutional issues below. The South Carolina Court of Appeals denied Paul's motion for reconsideration, and the South Carolina Supreme Court denied his petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

THE LOWER COURT VIOLATED PETITIONER'S DUE PROCESS RIGHTS BY TAKING HIS PROPERTY BASED UPON A PURPORTED SETTLEMENT ANNOUNCED BY HIS ATTORNEY, AND BY REFUSING TO HEAR PETITIONER'S OBJECTIONS TO THE SETTLEMENT

This case is important because it goes to the heart of the constitutional due process guarantee: the individual's right to be heard in court. Although the record is limited because the trial court refused to hear Paul, there is no question that Paul was vehemently opposed to the terms of the settlement

that his attorney had just announced in court. The question presented by this case is whether a trial court may enter a purported agreement in an order in the face of evident opposition to that agreement by the party himself, and whether the court may refuse to hear a party's objections to an agreement announced by his attorney.

This Petition does not challenge the general rule in South Carolina (as in many jurisdictions) that a party is bound by his attorney's statements and agreements affecting a pending case. *Arnold v. Yarborough*, 281 S.C. 570 (Ct. App. 1984). It is an attorney's job to speak for a client and, absent an obvious disagreement, the court and other parties should be able to rely upon the attorney's statements.

An attorney's ability to act on behalf of her client, however, varies with the situation. Generally, tactical decisions concerning presentation of a case may be made by an attorney without even consulting her client. In contrast, this Court has recognized that certain important decisions belong to the client alone. Thus, in criminal cases, "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745 (1983). For

extremely important decisions, such as the decision to plead guilty, this Court has recognized that an attorney may not speak for his client without prior consultation. *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969). Thus, it is the practice of trial courts to examine defendants directly when taking a guilty plea, and not to merely rely upon representations by their attorneys.

In other cases, although particular decisions may ultimately belong to the client, trial courts typically rely upon representations of counsel without independently verifying the client's consent. However, courts have recognized that in extraordinary situations, when the client clearly was not consulted at all, it is improper to accept from counsel a decision that should have been made by her client. *Peek v. Kemp, 746 F.2d 672 (11th Cir. 1985)*. In contrast, when counsel enters into a stipulation in the presence of a party who expresses no dissent, it may be effective and binding upon the party. *Leser v. United States*, 358 F.2d 313 (9th Cir. 1966).

In the present case, the situation is entirely different. Despite the importance of the agreement the parties purportedly entered into, the court relied entirely upon representations of counsel. What makes this case egregious is the fact that the court did so in the face of Petitioner's

obvious unwillingness to enter into such a settlement. Instead, the court refused to allow Petitioner to speak, and faceciously remarked "I pledge allegiance to the flag . . .." The court then announced that the case was over and adjourned.

This case is important because it involves a situation that arises frequently in practice. Often, as a case progresses, the court appropriately exercises its discretion in seeking to lead the parties to a settlement. Not infrequently, this takes the form of an *in camera* discussion involving the court and the attorneys, and excluding the parties. Any trial attorney is familiar with the hurried conference between attorneys and clients which frequently follows, immediately after which the attorneys announce a settlement has been reached. While this process is a common one and typically leads to reasonable compromises, the integrity of the process depends upon the individual parties giving their actual willing and informed consent to the settlement that is announced. When a court refuses to allow a party to be heard, instead choosing to force a case to close through a purported agreement, a fundamental due process right is violated.

Very briefly, the underlying rights of Petitioner are also important ones. The lower court had previously found

that the dirt road through Petitioner's farm was a public one, and Petitioner does not seek to challenge that finding. However, the order challenged here by Petitioner relocated the road to a place that it clearly had never been in the past, and also widened it. The evidence at the hearing addressed the question of how wide the road "needed" to be to constitute a "two plow" road. There was no evidence as to how wide the road actually had been in the past, and the County testified that it actually maintained roads as narrow as ten to twelve feet. Petitioner should be compensated for the taking of any property that was not included in the original dirt road across his farm.

Unfortunately, the trial court cut the proceeding short by forcing the attorneys to announce a settlement and refusing to hear Petitioner's objections to the settlement. Petitioner's appeal proceeded *pro se*, and failed when the South Carolina Court of Appeals determined that the constitutional issues had not been raised below. How may a party preserve an issue for appeal when the court refuses to allow the party to speak, and encourages the attorneys to conclude the case within an agreement to which the client refuses to subscribe?

CONCLUSION

For the reasons stated above, this *Petition for Writ of Certiorari* should be granted, and the Court should allow the Petitioner to file his Brief in order to set forth in greater detail the legal and factual basis of his claim. If this Petition is not granted, Petitioner and other similarly situated litigants will continue to suffer due process violations when they are denied the right to speak and their attorneys meet with courts behind closed doors.

Respectfully submitted,

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February 6, 1997

APPENDIX A

The Supreme Court of South Carolina

NOVEMBER 8, 1996

Mr. Alexander Paul
1700 Greenfield Road
Darlington, SC 29504

Re: Cribb v. Paul, et al.
Case No.: 89-CP-16-431

Dear Mr. Paul:

The Court has issued the following Order on yoru Petition for a Writ of Certiorari in the above-referneced matter:

"Petition for Writ of Certiorari denied.

by s/E. C. Burnett, III, A.J.
For the Court

November 08, 1996."

By copy of this letter we are forwarding the itemized Statement of Costs filed in this matter to the Court of Appeals

and also advising all itnerested parties of the action of the Court in this matter.

Very truly yours,

Clerk

CND,jr/SBM
cc: John M. Milling, Esquire
James Lucas, Esquire
The Honorable Kenneth A. Richstad (w/enclosure)
The Honorable Paulette Lowe
West Publishing Company

APPENDIX B

THE SOUTH CAROLINA COURT OF APPEALS

C.R. Cribb and Vacie S. Cribb,
Respondents,

v.

Alexander Paul and Darlington County, of whom Alexander Paul is Appellant.

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After careful consideration of the petition for rehearing, this court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, therefore ordered the petition for rehearing be denied.

Jasper W. Curton

C. Tolbert Goolsby

Ralph King Anderson, Jr.

APPENDIX C

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

C.R. Cribb and Vacie S. Cribb,
Respondents,

v.

Alexander Paul and Darlington County, of whom Alexander Paul is Appellant.

Appeal from Darlington County
James E. Lockemy, Judge

Unpublished Opinion No. 96-UP-144
Submitted May 7, 1996 - Filed May 14, 1996

AFFIRMED

Alexander Paul, of Darlington, pro se.

John M. Milling, of Darlington, for respondents.

James H. Lucas, of Hartsville, for Darlington County.

PER CURIAM: Alexander Paul appeals from an October 18, 1994 order concerning the reopening of Round O Road, claiming the trial court erred by incorrectly interpreting a prior court order that defined the width of the road and affirming a prior court order finding no liability to the county for working Round O Road. We affirm pursuant to Rule 220 (b) (2), SCACR, and the following authorities: Issue I: Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976) (in a law case tried without a jury, appellate review is limited to correction of errors of law and a determination as to whether there is any evidence to support the trial court's factual findings); McCoy v. McCoy, 283 S.C. 383, 323 S.E.2d 517 (1984) (constitutional objections cannot be raised for the first time on appeal); Issue II: Resolution Trust Corp. v. Eagle Lake and Gold Condominiums, 310 S.C. 473, 427 S.E.2d 646 (1993) (a ruling not appealed becomes the law of the case).[1]

AFFIRMED.

CURETON, GOOLSBY, AND ANDERSON, JJ., concur.

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[1] Because oral argument would not aid the court in resolving the issues, we decide this case without oral argument.

APPENDIX D

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
) FOURTH JUDICIAL CIRCUIT
COUNTY OF DARLINGTON) CASE NO.: 1989-CP16-431

C.R. Cribb and Vacie S. Cribb,

Plaintiffs,

v. ORDER

Alexander Paul and Darlington County,

Defendants.

This matter was heard by the undersigned on Wednesday, September 14, 1994, and the hearing was concluded on Monday, September 19, 1994. The Plaintiffs in this matter are represented by Mr. John M. Milling. The Defendant, Alexander Paul, is represented by Ms. W. Carole Holloway, and the Defendant, Darlington County, is represented by Mr. James M. Lucas. The issues, which were presented to the Court, dealt with the location of the Round O Church Road. This was a County road that previously existed but had been closed by the Defendant, Alexander Paul, and had not been worked by Darlington County for a number of

years. There was a dispute as to where the road should be located when the County once again began working the same. The Court was also requested to deal with the question of the width of the road as provided for in the prior Order of Judge Lewis. This prior Order had called for the road to be eighteen (18') to twenty-two (22') feet in width, with enough shoulder to push the dirt from the plowing activity onto the same. The Court was also presented with the question of whether or not certain posts that had been located along the edge of the proposed area for locating the Round O Church Road constituted a hindrance. There was also a question of who would be the owner of the strip of land lying between the County road once it was reopened, and certain property belonging to Bonita L. Cribb.

The Court took testimony with respect to this matter from witnesses and two different surveyors. One of these witnesses was Mr. Bobby Richardson, who is the road maintenance supervisor. His testimony revealed that, in addition to the scraped area for a road, it is necessary that there be three (3') feet on either side of the road to handle the dirt that would be pushed up. He also testified that the posts which had ben located by Mr. Paul, would constitute a hazard in attempting to open and maintain the Round O Church

Road. He also offered testimony as to where the road had been at the time it was previously being maintained by Darlington County.

Prior to the Court announcing its decision in the matter as to where the road would be located, the parties advised the Court that they had reached an agreement as to the same. The parties agreed to follow the location of the road as proposed by Darlington County. At the point where the road ran in front of the property of Bonita L. Cribb, the parties agreed to use the map proposed by Darlington County and to add to the width of the area shown in front of this home a distance of six (6') feet, making a right-of-way of twenty-seven and nine-tenths (27.9') feet, and that the Round O Road would be located within that right-of-way area.

The Court finds that, with respect to the interpretation of the Order of Judge Lewis, it is a proper interpretation that there should be, in addition to the scrapped road area which will vary in width between eighteen (18)' and twenty-two (22') feet added thereto an additional six (6') feet to handle the dirt pushed up from the process of maintaining the road. Accordingly, there shall be added to the dimensions shown on the County map an additional six (6'), and that combined area shall constitute the right-of-way which the County has for the

purpose of maintaining this road as a "two-plow road."

The Court also finds that the posts that were placed by Mr. Paul are a hindrance to the reopening of the road and would constitute a danger if allowed to remain. Mr. Paul shall have his obstructions removed from their location by October 25, 1994. Thereafter, he shall not place posts or fencing or any other objects in the area provided as the right-of-way for the Round O Church Road.

As previously stated, the parties have reached an agreement as to the location of the road in front of the home of Bonita L. Cribb. By virtue of this agreement, there will be no strip of land between her property and that constituting the right-of-way to Darlington County for the maintenance of the Round O Church Road. Accordingly, there is no decision which the Court needs to make relative to the ownership of that strip of land.

IT IS, THEREFORE,

ORDERED:

1. That the location of the Round O Church Road shall be as shown on the map prepared for Darlington County and introduced herein as its Exhibit. That map, however, is modified to provide that there shall be added to it an additional six (6') feet in Order to handle the dirt that will be

pushed to the side by the reopening and maintenance of the Round O Church Road. That the location of the stakes on the corners of the Bonita L. Cribb property shall constitute the outermost area of the right of way which shall be twenty-seven and nine-tenths (27.9') feet in front of her home, and the road shall be located in said right-of-way. With respect to other portions of the road, as located by the County on its map, the additional six (6') feet shall be added to whichever side of the road that would facilitate its reopening by Darlington County. Darlington County shall re-stake the road and have the new stakes in place by October 10, 1994.

2. That the posts and fencing, which have been located along the proposed location of the reopening of the Round O Church Road by Mr. Paul, shall be removed by October 25, 1994. Mr. Paul shall not locate any obstruction within the right-of-way provided to Darlington County in connection with the Round O Church Road.

3. That Darlington County shall begin, weather permitting, reopening the Round O Church Road on October 26, 1994, and shall continue to maintain the same as provided for in the Order of Judge Lewis, dated November 12, 1990. There will be no liability to the County in connection with its

reopening and working the road as provided for in the Order of Judge Lewis.

JAMES E. LOCKEMY,
Presiding Judge

This 18 day of October, 1994.
Dillion, South Carolina

APPENDIX E

Motions Hearings of September 14, 1994

Opening Statements . . . Mr. Lucas Page 46, Lines 13-25

The Court: Well, that may be so, Mr. Lucas, but I'm sure you understand that if a definite Order has got to be made, a definite footage has got to be put there, and you can't say during the dry time it's got to be such and such, the other times it's such. It's got to be the same footage at all times. So what is the County's position that a distance for a spray is needed from the roadway?

Mr. Lucas: Judge, to accommodate a -- I guess a maximum spray period, for lack of a better term, I've talked with Mr. Richardson who is the County Road Supervisor, and he informs me that three feet on either side should be sufficient even during a very heavy period.

Page 47, Lines 1-20

The Court: So you're saying you need three feet in addition to the roadway -- actual roadway?

Mr. Lucas: That would be correct, Your Honor. And again, that's an estimate.

The Court: What is -- is there any problem with the road that would be fifteen feet wide? Say, for example, if you need three feet in Ms. Holloway's position that the spray was included in the figure, and you have some distance of the road is only eighteen feet wide; right?

Mr. Lucas: Yes, sir.

The Court: So at some places you only have fifteen feet.

Mr. Lucas: The County maintains roads with as small as ten, eleven and twelve feet, so we would -- obviously, the County would rather it be larger, but there's no subdivision regulation or rule that would provide in this case that the road could not be that size.

Page 51, Lines 9-25

The Court: Let me ask you this, Mr. Lucas. The cross ties, you won't actually be plowing over in that area, will you? If they were level, would that not be just sufficient?

Mr. Lucas: Well, Judge, to the extent that you would not have to go in and provide for any ditching or any maintenance to the spray area which oftentimes you may need to do.

The Court: You're going to do all of that within the three feet, too?

Mr. Lucas: Yes, sir. And we're not -- this road has never been ditched before, but the extent -- and maybe I shouldn't use the word ditching, but that extent we would have to provide some additional maintenance in that area, it would be difficult to get in there and actually do it. And besides, I think it would probably be a little dangerous to try to take a mobile grader and run it in there.

Page 52, Lines 1-25

The Court: Let me ask you this. Why, then, -- why, then, would you all put stakes just for the width of the road? I mean, the Highway Department puts those stakes the width of the right of way. Why would you not have put the stakes the width of what you thought the right of way would be?

Mr. Lucas: Well, Judge, because we were unclear at that time as to whether or not the spray was included or excluded.

The Court: So you took the position that it was not included -- or it was included?

Mr. Lucas: Yes, sir, we took the position that it was excluded.

The Court: Then why would you put the stakes where they were?

Mr. Lucas: Because the stakes delineated just the eighteen to twenty-two feet portion and not the spray area.

The Court: I know that, but please correct me if I'm wrong, because I'm not an engineer by any form of the way, but if in fact you think you need three feet for a spray, why then would you not put your stakes with the three feet and the eighteen to twenty-two so you'd have all of the width you needed?

Page 53, Lines 1-17

Mr. Luc . Judge, I guess what we initially --

The Court: Why put the stakes exactly the measure of the road when you need three more feet?

Mr. Lucas: Well, we didn't know at the time if that was exactly the measure of the road or not. If you had concluded, Judge, that that was inclusive of the spray area, then that would --

The Court: Then why did y'all act as if it was inclusive?

Mr. Lucas: Judge --

The Court: By putting stakes down, you're almost acting that way, aren't you?

Mr. Lucas: Well, Judge, we had to do one or the other, and for purposes of discussion, we did put them at the area shown on the plat.

Ferrell Prosser - Cross by Mr. Lucas. Page 84, Lines 13-16

Mr. Lucas: Sir, I don't think I have any further questions.

The Court: Okay. Ms. Holloway?

Ms. Holloway: Nothing, your Honor.

Ferrell Prosser - Redirect by Mr. Milling. Page 87, Lines 16-22.

Mr. Milling: Okay. No further questions of this witness.

The Court: Mr. Lucas, anything else?

Mr. Lucas: Nothing further, your Honor.

The Court: Ms. Holloway?

You may step down. I need to recess this hearing.

Transcript of Record, Continuation of hearing, September 19, 1994 Opening Statement from Mr. Milling. Page 88, Lines 1-23

The Court: This is a continuance of the hearing of C.R. Cribb and Vacie S. Cribb versus Alexander Paul and Darlington County. At the time the only issue I'm looking into is the width and place or position of a road that is -- I think is it called the Round O Road is the name of it?

Mr. Milling: Yes, your Honor.

The Court: And portions of it is set but there's a portion of it hasn't been used in a while. And according to the previous orders. It was to be reopened. And the only issue right now is what distance shall it have and also exactly where will the road be placed.

We had a hearing last week at which time Mr. Milling called a witness who was a private surveyor who had done some surveying there in the '60's. Also --

Mr. Milling: If your Honor please. I need to make a correction for the record. Mr. Prosser (phonetic) pointed out to me that I think it may have been the early '80's when those surveys were done. When he went back and looked at his notes, he just looked at them wrong.

The Court: He did say the '60's.

Mr. Milling: He did say the '60's, yes, sir.

The Court: Okay. It was really early '80's when he did the surveys or he surveyed -- correction on it.

Bobby Richardson, Direct Page 90, Lines 6-25

Bobby Richardson, being first duly sworn, testified as follows:

Clerk: Please have a seat in the witness chair and state your full name for the record.

Witness: My name is Bobby Richardson.

The Court: Okay. Your witness, Mr. Lucas.

Mr. Lucas: Thank you, your Honor.

DIRECT EXAMINATION BY MR. LUCAS

Q Mr. Richardson, where are you employed?
A Darlington County.
Q In what capacity?
A I'm the Road Maintenance Director.
Q How long have you been Road Maintenance Director?
A Since October of 1987.
Q And how long have you been employed with the County?
A Continuously since August of 1973.
Q What position did you hold prior to becoming Road Maintenance Director?
A I was an equipment operator.

Page 91 Line 16

Q Are you familiar with the Road O Church Road?
A Yes, sir.
Q How are you familiar with that road?
A Having maintained this road through the course of my employment with Darlington County as an operator and overseeing maintenance in the position I currently have.
Q You say having maintained this road. Is this road maintained pursuant to any deed or other right of way on record that gives the County the right to work this particular road?
A To my knowledge there's no formal dedicated right of way to any part. There's a platted right of way from the old Society Hill Road won to the old former Round O School..

Q Has there been a formal dedication and acceptance of any portion of this road?

A No. Sir.

Bobby Richardson, Cross. Page 101, Lines 23-25

Q 2 and 3 of Plaintiffs from the last hearing show water standing where the old road was. Did the County when you were maintaining the road have from time to time have to work some area in order to keep the water out of the road?

Page 102, Lines 1-10

A There were never any ditches. What we try to do is put some crown in the road so there's not water, you know, standing in the center of the road. However, in a case where you don't have right of way, that's not always possible either.

Q All right. In connection with keeping the road open, will you have enough room with it being a two plow road to also divert the water off of it?

A Not without some drainage structures such as ditches.

James B. Godfrey, III, Direct By Lucas Page 103 Lines 1-10

The Court: Mr. Richardson, let me ask you: do you know why the road ceased to be worked?

Witness Richardson: Yes, sir. There was some contesting of the right of way by Mr. Paul.

The Court: So therefore, you all just stopped working it?

Witness Richardson: Yes, sir, until the courts gave us a decision.

The Court: All right. Anyone else?

(No response.)

James Godfrey - Cross by Milling. Page 118 Lines 6-8

Mr. Lucas: Nothing further, your Honor.

The Court: What about you, Ms. Holloway?

Mr. Holloway: Nothing, your Honor.

Page 119, Lines 5-12

The Court: That property right there, the way he's got the road as it is and the stakes and all that, could you plow that road and not put dirt on either Mr. Paul or Ms. Cribb's property?

Witness Richardson: Your Honor, as Mr. Lucas stated earlier, you can maintain. We have some right of ways that are 12, 15 feet. To use a full

width blade, it would in my opinion not be possible to have a good ---

Alexander Paul, Cross Page 134, Lines 17-22

The Court: Okay. So this is the one you would like the Court to adopt this one from the County?

Witness Paul: Yes, sir, as long as the County stayed within those stakes. But when they go outside and you find a tree in the way that's 12, 14, 16 inches in diameter, something's wrong, your Honor.

Page 140, Lines 20-25

The Court: Mr. Richardson, let me ask you another couple of questions, sir. Did you say -- stand up for me if you would.

(Complied.)

The Court: You can just stay there if you can speak loud enough for her to hear. Did you say that each side to maintain a two plow road, you need 3 feet maximum on each side or did

you mean minimum?

Page 141, Lines 1-11

Witness Richardson: Maximum without drainage structures. And there's never been any drainage structures there, as far as any ditches.

The Court: If you had 2 feet on each side, that would be sufficient?

Witness Richardson: I would prefer 3.

The Court: You mean 3 feet maximum is what you mean?

Witness Richardson: Well, the 2 feet would do it. But, you know, 3 feet's even better.

Page 142, Lines 7-25

The Court: Okay. All right. I'm going to give you about 5 minutes or 10 minutes. Between that time, could I see three counsel, and I'll be back in just a minute.

(A recess was taken.)

The Court: Ms. Holloway, have you all discussed this matter now after my discussions with you?

Ms. Holloway: Yes, your Honor.

Mr. Milling: Your Honor, please, the parties have agreed, as has been pointed out by all surveyors, there are currently existing irons that were placed in the Bonetta Cribb/Edward Cribb property as shown on each of the plats.

The Court: Yes, sir.

Mr. Milling: The parties have agreed to measure in from that 3 feet, basically put in another iron pin in the 3 feet between the existing pin and the new pin would be that area for the spoilage or where the excess --

-

The Court: And we're using that plat as drawn by Mr. Godfrey?

Mr. Milling: Yes, sir.

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The Court: Okay.

Mr. Milling: Then from that new pin, come over the distance that the county has used, which I think was 21.9 feet and put a pin there, and then go over another 3 feet and put another pin in, and it would be that -- that 3 feet would represent the spoilage area that would fall on Mr. Paul's land.

The Court: Now, let me ask you: why do you need to have pins other than one end pins, really in essence, 27.9 feet away from that pin? Why do you need to have pins -- I mean, seems to me, why do you want to have ---

Mr. Milling: We can do that. I was just trying to put it so that we would put the road surface in, so that there wouldn't be any question about when the road surface was and where the ---

The Court: Well, the county roads, you have a right of way for that distance, wouldn't you, Mr. Lucas?

Mr. Lucas: Yes, sir.

Mr. Milling: Yes, sir.

The Court: Instead of having a pin in between there, just have one pin on the front of the Cribb property and one pin 27.9 feet from there ---

Mr. Milling: All right, sir.

The Court: --- I guess would be right. Mr. Richardson, he's gone, hadn't he?

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Mr. Lucas: I believe he's out in the hall. But, your Honor, I think that would do it.

The Court: Instead of having pins in between. All right.

Now, what else, Mr. Milling?

Mr. Milling: If your Honor please, that ends up eliminating any questions. And Mr. Paul, I understand, he agreed that he will remove the existing structures as they are now. And, of course, if he chooses to relocate something else, it would be located outside of that 27.9 foot right

of way area in front of the Cribb's home.

The Court: All right, sir. Any posts or whatever are on that 27 foot right of way, Ms. Holloway, Mr. Paul will remove it?

Ms. Holloway: Yes, your Honor.

The Court: Do we have a time on this?

Mr. Milling: We would like to go ahead and get it resolved as soon as we can.

The Court: Well, let's get a time. Let's set a time. Ms. Holloway, how long do you think Mr. Paul needs.

Ms. Holloway: 30 days from the date of the order, your Honor.

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The Court: I would hope so. Can you all imagine any other issues? It seems like this case I've heard now for over a year and each time it's a different issue: whether it be about farm machinery or whether it be

about farming equipment or land or stakes or wires or sprays or whatever else. Anything else?

Mr. Lucas: No sir.

The Court: Mr. Milling?

Mr. Milling: Not that I'm aware of.

The Court: Ms. Holloway?

Ms. Holloway: No sir.

The Court: Okay. Well, Mr. Paul, I appreciate the fact that you've looked up in the dictionary for me and got me the definition of "spray," a liquid flying and small drop-like water

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blown from a wave; that's one definition. Two, you say it's a -- it's like a drop of fine vapor as from an atomizer. And then, three, you've got an instrument as an atomizer for scattering fine liquid. Those are the three definitions of spray.

The fourth one you didn't have in there. It's also a bunch of flowers you put over a coffin. So let's make sure we don't have situations that this thing gets to the extent we start arguing and fighting among yourselves and we have some tragedy. I hope not. I hope we can keep it out of general sessions court.

Mr. Paul: It's been good knowing you on these things, sir.

Mr. Paul: Let me say one thing, judge.

The Court: I'm not sure I want to let you say one thing.

Mr. Paul: This is a case that would make the founding forefathers of this country's bones, dried bones, get up and tremble in their grave.

The Court: Yes, sir. I pledge allegiance to the flag. Okay. Everybody, that's enough. Thank you very much. This case is over.

Mr. Milling, prepare me an order.

Mr. Milling: Yes, your Honor.

Supreme Court, U.S.
FILED
MAR 27 1997
OFFICE OF THE CLERK

No. 96-1254

In The

Supreme Court of the United States

October Term, 1996

ALEXANDER PAUL and DARLINGTON COUNTY, of whom ALEXANDER PAUL is

Petitioner,

vs.

C.R. CRIBB and VACIE S. CRIBB,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Carolina

RESPONDENTS' BRIEF IN OPPOSITION

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19 pp

QUESTION PRESENTED

When no federal question has been presented to a state court during the trial of a case, and an Order is issued based, in part, upon an agreement announced by the participating attorneys in open court in the presence of the parties, and the Order so issued does not address any federal questions and on appeal for the first time a party attempts to raise a state constitutional issue and does not allege that he has previously been prevented by the trial court from raising any issue's, nor alleges that he did not consent to the agreement announced in his presence in open court by his attorney, has a party been denied constitutional due process and should he be allowed to assert at this time in a Petition for Writ of Certiorari that the trial court refused to allow him to speak and that he disagreed with the settlement announced by his attorney?

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Respondents request that the Court deny the Petition for Writ of Certiorari seeking review from the Opinion of the South Carolina Court of Appeals of May 14, 1996, unpublished Opinion Number 96-UP-144. This Order is identified as Appendix C to the Petition.

STATEMENT OF JURISDICTION

It is Respondents' position that jurisdiction would not vest in this case in the Supreme Court by virtue of 28 U.S.C. § 2104. In a case such as this, jurisdiction would be based, if at all, on 28 U.S.C. § 1257(a). However, in this case, the Court cannot properly exercise jurisdiction over the matter as the question of constitutional due process was never presented to the South Carolina Courts. This newly presented argument may not properly be considered at this time.

STATEMENT OF THE CASE

Respondents respectfully oppose the Petition for Writ of Certiorari in this case. For the most part, the Petition assails the trial judge as well as prior counsel. The Petitioner incorrectly and improperly accuses the trial judge of refusing to allow him to speak, and further states that it was obvious that he had disagreed with a settlement that had been announced by his attorney in open court. The statement formed a basis for one portion of the trial court's Order, and the court made findings as to other portions. While the Petitioner did not raise federal constitutional issues in the trial court in South Carolina, it was not as a result of this opportunity being denied by the court in any way, but is simply being asserted as an after-thought by the Petitioner, as he is once again attempting to avoid the Orders of the South Carolina Courts in this matter.

A. Course of Proceedings and Disposition of the Case Below.

The Respondents first filed their case on August 7, 1989. This action basically dealt with two (2) issues. One of these issues related to the claim by the Respondents that the dirt road known as the Round O Church Road, was a County Public Road and should be declared as such to be maintained by the County of Darlington (S.C.) The case was ultimately referred to the Honorable J. Woodrow Lewis as Special Master. Judge Lewis had, at that time, retired as the Chief Justice of the South Carolina Supreme Court, and kindly agreed to serve as Special Master in this case. Judge Lewis issued his Order in this matter on November 12, 1990.

The Order of Judge Lewis, as Special Master, was affirmed by the Honorable Edward B. Cottingham, Judge of the Fourth Judicial Circuit, by Order dated February 25, 1993. The Petitioner appealed from the Order of Judge Cottingham which affirmed in all respects the Order of Judge Lewis. The Appellate Courts affirmed the Order of Judge Cottingham, and by letter dated December 7, 1993, the Supreme Court of South Carolina advised Mr. Paul that his Petition for Rehearing had been denied.

Hearings were held during 1994 before Judge Lockemy with respect to various issues, including whether or not Darlington County should proceed with immediately reopening the Round O Church Road because it had been plowed under by Mr. Paul. As a result of a hearing held on March 30, 1994, Judge Lockemy issued an Order dated April 21, 1994, which provided that Mr. Paul would remove crops growing in the area of the Round O Church Road, as well as an electric fence and that on April 30, 1994, Darlington County would commence with reopening and reworking the Round O Church Road in its entirety. The Order further provided that if Mr. Paul did not comply with this provision of the court Order, that he should immediately be brought back before the court for a Rule to Show Cause hearing.

Difficulties continued after the county performed its survey, as Mr. Paul placed posts immediately adjacent to the area where the road was to be located according to the position of Darlington County. Further, an issue arose as to the proper interpretation of the Order of Judge Lewis as to the width, boundaries and location of the Round O Church Road. A Notice of Hearing as to the issues which would be addressed was served on the Petitioner. However, no responsive pleading was filed by Mr. Paul attempting to raise any additional issues, including whether or not he had been denied any due process rights under the Fifth and Fourteenth Amendments of the United States Constitution. A hearing was held in this matter before Judge Lockemy on September 14, 1994, and it was concluded on September 19, 1994. The issues to be addressed at that hearing were discussed by the court with the attorneys from pages 8 through 19 of that transcript. The court provided the attorneys the opportunity, at that time, to present what the attorneys felt, on behalf of their clients, were the issues to be addressed. Ms. Holloway, as the attorney for the Petitioner, had ample opportunity to raise the issue that if the court concluded that an additional amount of land was needed to handle the dirt being pushed aside by the plowing and scraping activity, that it would constitute an unlawful taking without compensation. At no time was this issue presented by Ms. Holloway. Of course, the court, at that time, was interpreting the language of the Order issued by Judge Lewis, and if the interpretation was that the Order provided for a maintained surface of eighteen (18') feet to twenty-two (22') feet and such additional area as necessary to handle the dirt pushed aside, then there would be no reason to raise such issues, as all the court was doing was restoring the road which had been destroyed by Mr. Paul to its original size, location and width.

Following the conclusion of the testimony in this case on September 19, 1994, the court again addressed the issues which

it had before it to be considered. These issues are found on pages 50 through 55 of the transcript. The court inquired on lines 7 and 8 on page 52 as to whether or not there were any other issues to be considered by the court. While the Respondents' attorney presented another potential issue, Petitioner's attorney, though having the opportunity to try and insert federal constitutional issues even though no testimony had been offered on the same, advised the court on page 55 at line 19 that there were no other issues. Further, the testimony of the Petitioner is found on pages 36 through 49 of the transcript taken on September 19, 1994, and at no point in Mr. Paul's testimony is there any effort by him to raise federal constitutional due process issues. Had the Petitioner attempted to raise these issues, then certainly his testimony would have been included in his Appendix.

Judge Lockemy issued his Order on October 18, 1994, and that Order, as well as the Orders of the appellate court in South Carolina are printed in the Petitioner's Appendix.

B. Correction of Misstatements in the Petition.

Pursuant to United States Supreme Court Rule 15.1, Respondents bring the following misstatement of facts contained in the Petition to the Court's attention.

The Petitioner misrepresents to this Court that the hearing conducted by the lower court on September 14 and 19, 1994, was "... to determine where the road was to be located and whether the county could take an additional six (6') feet in width so as to maintain the road as a 'two (2) plow' road with a three (3') foot shoulder on each side." As is clearly shown in the Notice of the Hearing and the portions of the transcript where the issues to be covered were discussed, the court, at no time, was discussing the taking of an additional six (6') feet in width, but

was discussing what was the proper interpretation of the Order of Judge Lewis and as to whether or not the eighteen (18') feet to twenty-two (22') feet described by Judge Lewis was to include the area where the dirt was pushed up or whether it was to exclude that area. To the extent that the court was making any definitive decision as to an actual width needed to handle the area where the dirt would be pushed, it was only making a determination that if Judge Lewis intended for that area to be in addition to the eighteen (18') feet to twenty-two (22') feet of plowed area, what width was needed to handle the dirt. Such an interpretation of the Order of Judge Lewis would not amount to a taking because Judge Lewis had already ordered that enough area be included in the right-of-way to have a road that would have a traveled surface of eighteen (18') feet to twenty-two (22') feet, plus enough shoulder to handle the dirt from the plowing activity. There is no "taking" involved with the interpretation of the Order of Judge Lewis.

The Petitioner also asserts to this Court that at the time he asked to speak to the court, that it was for the purpose of objecting to the purported agreement which had been announced by his attorney. There is, however, no statement by Mr. Paul in the record to support the contention that he was speaking for the purpose of objecting to the agreement. Had he been intending to do so, one would clearly have expected Mr. Paul to state simply that he objected to the agreement.

The Petitioner also states to this Honorable Court that the trial court refused to allow a party to be heard and, instead, chose to force a case to close through a purported agreement. The Petitioner fails to set out that at the point where the agreement was reached, all testimony had been received and the case had, at that time, been concluded. The Petitioner also fails to point out and address the fact that independent of any agreement announced to it, that the court made its own finding

and conclusion with respect to the interpretation of the Order of Judge Lewis and found that the proper interpretation was that there should be in addition to the scrapped road area which will vary in width between eighteen (18') feet and twenty-two (22') feet, added thereto an additional six (6') feet to handle the dirt pushed up from the process of maintaining the road. While an agreement may have been given to the court, the court was free at that point in time, when it issued its Order, to make its own findings of fact, and it, in fact, did so.

C. Objection to Question.

Pursuant to United States Supreme Court Rule 15.1, Respondents object to the consideration of the question presented in the Petition based on what occurred in the proceedings below.

The Petitioner states that the court refused to allow him to speak. As previously set out in the Misstatement of Facts, such an assertion does not comport with what actually occurred at the hearing. Further, the Respondents object to the assertion by the Petitioner that it was obvious that he had disagreed with the settlement announced by his attorney. Again, a reading of the entire record shows that there is no evidence to that effect, and the Petitioner never said that he objected to the settlement agreement. Further, the Petitioner never filed a Motion for Reconsideration by the trial court based upon an alleged objection to the agreement, nor when the Petitioner appealed the case, did he anywhere state in his brief to the court that he objected to the agreement as announced by his attorney.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER THE PETITIONER'S ARGUMENT.

This Court wisely refuses to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in the state court below. *Yee v. City of Escondido,* 503 U.S. 519, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992).

As stated in *Yee v. City of Escondido, supra,* "In short, Petitioners did not raise a substantive due process claim in the State Courts, and no State Court has addressed such a claim. In reviewing the judgments of State Courts under the jurisdictional grant of 28 U.S.C. § 1257 [28 U.S.C.S. § 1257], the Court has, with very rare exceptions, refused to consider Petitioners' claims that were not raised nor addressed below."

South Carolina law is consistent with federal law, and arguments not presented to the trial court cannot be presented in the appellate courts. As stated in the case of *McCoy v. McCoy,* 283 S. Ct. 383, 323 S.E. 2d 517 (1984), Constitutional objections cannot be raised for the first time on appeal. Further, a reading of the Petitioner's appellate brief reveals that the Petitioner never attempted to raise any federal constitutional issues. In his appellate brief, for the first time, the Petitioner specifically referred to the South Carolina Constitution, Article I, Section 13, and while such a position was not timely raised by the Petitioner, it did not encompass any assertion that his federal constitutional rights had been violated.

Pursuant to United States Supreme Court Rule 14.1 (g)(i),

the Petitioner, when review of a state court judgment is sought, is to specify at what stage of the proceedings both in the court of first instance and in the appellate court, the federal question sought to be reviewed was raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to places in the record where the matter appears so as to show that the federal question was timely and properly raised, and that this Court has jurisdiction to review the judgment on a Writ of Certiorari. The reason Petitioner has not met these requirements of Rule 14.1 of the rules of the Supreme Court is because no federal question was ever presented, and at no place does the Order of the trial court address any federal issue. The Petitioner seeks to skirt this important rule by simply asking the rhetorical question of "How may a party preserve an issue for Appeal when the Court refuses to allow the party to speak, and encourages attorneys to conclude the case within an agreement to which the client refuses to subscribe?" Of course, the record does not even support the contention set forth by the Petitioner in his query. The Petitioner clearly had the opportunity to file appropriate pleadings raising any due process issue under the Fifth and Fourteenth Amendments of the United States Constitution at any point in the original proceeding beginning in 1989, when the Complaint was filed by the Respondents to establish the Round O Church Road as a County Public Road, and further, these issues could have been raised at any point prior to the hearing actually held on September 14 and 19, 1994, when the Order of Judge Lewis was interpreted by Judge Lockemy. The Petitioner was clearly given notice of the issues that the Respondents were going to raise at the hearing and had ample opportunity to present to the court any other issues which he felt were appropriate. Further, prior to taking any testimony, the record clearly shows that Judge Lockemy inquired of the attorneys, in the presence of their clients, as to what issues were being considered, and after all of

the testimony had been received, and before any agreement had been announced, discussed with the attorneys in the presence of their clients the issues which the court was considering and gave the attorneys the opportunity to attempt to raise any additional issues. Further, Rule 59 of the South Carolina Rules of Civil Procedure provides that a party may move for a new trial or may move to alter or amend a judgment. This was an additional opportunity for the Petitioner to assert that he did not agree with the representations announced by his counsel in open court, as well as an opportunity to assert to the court that he did not consent to the agreement announced by his attorney, but that he did not do so because the court had not allowed him to speak. The Petitioner might also have attempted to use Rule 59 as a vehicle for presenting to the court information relating to his constitutional objections, if any he had. The Petitioner clearly did not avail himself of any of these opportunities to present constitutional issues to the court and cannot now be heard to complain that he was cut off by the court when he tried to object. Clearly, if Mr. Paul had intended to object, he would not have said, "This is a case that would make the founding forefathers of this County's bones, dried bones, get up and tremble in their graves." At that point, the Petitioner would have simply said, "I object to what my attorney has just stated to the Court."

The Rule in South Carolina is that a party is bound by his attorney's statements and agreements affecting a pending case. *Arnold v. Yarborough,* 281 S. Ct. 570, 316 S.E. 2d 416 (Ct. App. 1984). In that case, Yarborough had argued to the court that he never gave his attorney the authority to settle the case on the terms reached. That court went on to cite the case of *Ex Parte Jones,* 47 S. Ct. 393, 25 S.E. 285 (1896) wherein it is stated:

> . . . The employment of an attorney in a particular suit implies his client's assent that he may do everything which the Court may

> approve in the progress of the cause. Upon this distinction in large measure rests the certainty, verity, and finality of every judgment of a Court. Litigants must necessarily be bound by the acts of their attorneys in the conduct of a cause in Court, in the absence, of course, of fraud.

Clearly, in this case, there is no accusation that Petitioner's attorney in the trial court behaved in fraudulent manner, nor is there any basis for granting relief to the Petitioner because he now decides he does not like the outcome.

II.

THE SOUTH CAROLINA COURT DID NOT TAKE ANY PROPERTY OF THE PETITIONER.

The Petitioner states that the Order he has challenged relocated the road to a place that it clearly had never been in the past and also widened it. He states that there was no evidence as to how wide the road actually had been in the past, and the county testified that it had actually maintained roads as narrow as ten (10') feet to twelve (12') feet. Accordingly, the Petitioner contends that he should be compensated for the taking of any property which was not included in the original dirt road across his farm.

What the Petitioner fails to recognize in this case is that there has been no taking of property belonging to him. Rather, the Petitioner has, by his efforts, continuously attempted to take property, *i.e.*, the Round O Church Road, which belonged to the public and use it as a part of his fields to be planted for agricultural purposes and from which he would receive economic gain.

In the Order of Judge Lewis, he clearly states that the testimony revealed that the Round O Church Road had been maintained as a two (2) plow road, which resulted in a width of between eighteen (18') feet to twenty-two (22') feet, on which vehicles traveled, plus the area along the shoulders on which the dirt was pushed. It could be argued that Judge Lewis did not define the width adjacent to the eighteen (18') feet to twenty-two (22') feet scraped area on which dirt was to be pushed because he intended that whatever area was needed to handle the dirt was within the public's right of way. The issue only arose because of the desire of the county to know exactly how much area was within its right-of-way, and the conduct by the Petitioner in placing electric fences and posts along the area which was to be reopened as the Round O Church Road. While the county may have some roads which it maintains as narrow as ten (10') feet to twelve (12') feet, Mr. Bobby Richardson, who has been employed with Darlington County from August, 1973, until 1987, as an equipment operator, and since that time as Maintenance Director, testified at the September 19, 1994, hearing on page 8, line 4, through page 9, line 4, that he was familiar with the road in question. He testified that you could not have a two (2) plow road with a spray area adjacent to it in an area between eighteen (18') feet and twenty-two (22') feet if you were going to use the full width of the blade on the machine. He testified that he was familiar with the road in 1987, and that this road, as it existed in 1987, plus the spray area, would not have been able to fit within the eighteen (18') feet to twenty-two (22') feet parameter set out in the prior court Order. Further, when the court was discussing the issues with the attorneys on September 14, 1994, prior to the taking of testimony, the court inquired of Mr. Lucas, the attorney for Darlington County, as to whether or not cars can go both ways on a fifteen (15') foot road. At that time, Mr. Lucas advised the court that it would be very, very difficult. Mr. Lucas further advised the court that it is "pushing it" when a road is eighteen (18') feet wide, however, a

two (2) plow road generally can accommodate two (2) cars. This testimony is on page 18, lines 21-25 and page 19, lines 1-5 of the September 14, 1994, transcript.

At this point, Judge Lockemy was considering an appropriate interpretation of the Order of Judge Lewis. Judge Lewis had already made a finding that there was a County Public Road going through the Petitioner's land, which was a two (2) plow road, meaning that it would be eighteen (18') feet to twenty-two (22') feet, on which vehicles traveled, and in addition, there would be enough area along the shoulders along which dirt would be pushed. In interpreting the Order of Judge Lewis, any finding based upon appropriate principles of law would not constitute a taking, but would simply put back into the public domain property which the Petitioner was trying to confiscate.

On Appeal from the Order of Judge Lockemy, the court applied the appropriate standard of review and stated that in a case tried without a jury, Appellate review is limited to correction of errors of law and determinations as to whether there is any evidence to support the trial court's factual findings. *Townes Assocs. v. City of Greenville,* 266 S. Ct. 81, 221 S.E. 2d 773, (1976). The appellate court clearly found that there was sufficient evidence to support the finding reached by the trial court, independent of any agreement, that the proper interpretation of the Order of Judge Lewis should be that in addition to the scraped road area, which will vary in width between eighteen (18') feet to twenty-two (22') feet, there should be added thereto an additional six (6') feet to handle the dirt pushed up from the process of maintaining the road. Such an interpretation by the trial court does not result in a taking of the Petitioner's property.

III.

THERE ARE NO UNITED STATES SUPREME COURT RULE 10 CONSIDERATIONS PRESENT IN THIS CASE.

Rule 10 of the United States Supreme Court Rules provides that a Petition for a Writ of Certiorari will be granted only for compelling reasons. Rule 10(b) indicates that the Court will consider granting certiorari where a state court of last resort has decided an important federal question in a way that conflicts with the decisions of another state court of last resort or of a United States Court of Appeals. As previously pointed out, there has been no federal question decided at any point by a South Carolina Court. This case involved the interpretation of a prior Order issued by Judge Lewis. When Judge Lockemy, by his Order of October 18, 1994, interpreted the earlier Order of Judge Lewis dated November 12, 1990, he was resolving an issue of state law and applied state law in reaching his conclusion. No federal question whatsoever is addressed by the trial court, nor has a federal issue ever been addressed or presented to the trial courts throughout the entire history of this case.

CONCLUSION

The question presented by the Petitioner was not preserved and has no basis in fact and does not warrant this Court's attention. It is respectfully submitted that the Petition should be denied.

Respectfully submitted,

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